No. 12818

United States Court of Appeals

For the Ninth Circuit

SETH J. A. WELDON and DOROTHY WELDON,
Appellants

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANTS' BRIEF

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Jurisdiction of District Court

U. S. Code, Title 18, Section 3771 confers jurisdiction on the Supreme Court to make rules for District Courts which shall have the force of law. Pursuant to said authority, a rule has been adopted which is applicable in this case, as follows:

Rule 41 (e) of the Rules of Criminal Procedure of the United States District Court provides:

A person aggrieved by any unlawful search or seizure may move the District Court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that—

1. The property was illegally seized, without warrant.

2. The warrant is insufficient on its face.

3. The property seized is not that described in the warrant.

4. There was no probable cause for believing the existence of the grounds on which the warrant was issued.

Jurisdiction of the Court of Appeals

Jurdisdiction is conferred upon the Court of Appeals in this case by U. S. Code, Title 28, Section 1291.

Appellants believe it to be expedient to cite at this point a few cases having relation to this subject, as follows:

No proceedings whatever having been instituted against Dorothy Weldon, she has an undoubted right to appeal from the order.

U. S. vs. *Rosenwasser,* 145 F. (2d) 1015.

Go-Bart Importing Co. vs. *U. S.,* 282 U. S. 344, 356; 51 S. Ct. 153.

Perlman vs. *U. S.,* 247 U. S. 7; 38 S. Ct. 417.

Seth J. A. Weldon also has a right of appeal from said order.

Cogen vs. *U. S.,* 278 U. S. 221, 225; 49 S. Ct. 118.

In re Milburne, 77 F. (2d) 310.

In re Sana Laboratories, 115 F. (2d) 717.

The fact that a complaint was filed before the United States Commissioner against Weldon does not bar an appeal, since said proceeding is not considered to be a pending action.

U. S. vs. *Poller,* 43 F. (2d) 911.

By waiving the preliminary examination before the United States Commissioner, an accused does not waive his right to complain as to the sufficiency of the complaint.

U. S. vs. *Ruroede,* 220 F. 210.

Though an indictment had been returned pending the hearing of the motions, the appeal would still lie.

Goodman vs. *Lane,* 48 F. (2d) 32.

In re Sana Laboratories, 115 F. (2d) 717.

Where a stranger to pending proceedings brings a petition for return of property seized in violation of the Fourth Amendment, the proceeding is in the nature of a suit in equity.

U. S. vs. *Rosenwasser,* 145 F. (2d) 1015.

Go-Bart Importing Co. vs. *U. S.,* 282 U. S. 344, 356; 51 S. Ct. 153.

The United States Attorney and Federal Bureau of Investigation are subject to the orders of this Court.

U. S. vs. *Rosenwasser,* 145 F. (2d) 1015.

U. S. vs. *Antonelli Fireworks Co.,* 53 F. Sup. 870, 873.

The motions for return of property and its suppression as evidence, (R. 2 and R. 47), constitute the only pleadings in the case.

Affidavits in support of said motions and counter-affidavits were filed. The case as made was entirely by affidavit. No oral evidence was received.

Statement of the Case

This case arises out of an alleged unlawful search and seizure of property at the home of the petitioners, in violation of the Fourth Amendment.

Shortly after 6:00 A.M., on July 14, 1950, Wilbur L. Martindale, Charles B. Flack, Jr., William J. Geiermann, and Ivan B. Haack, special agents of the Federal Bureau of Investigation, came unexpectedly to the place of residence of Seth J. A. Weldon and his wife, Dorothy Weldon, at 3040½ Adams Avenue, San Diego, California, and, having knocked at the door, informed Mrs. Weldon that they had come to place her husband under arrest. Shortly thereafter said agents entered, placed Mr. Weldon under arrest, and announced their intention of searching the premises for property which they thought to be concealed there.

A thorough search was conducted, in the course of which they found $900.00 in currency, contained in a cigarette case, among the clothing of Mrs. Weldon in a dresser drawer in her bedroom; two bills of sale, one for a Crosley automobile and one for furniture, were also found and taken from the dresser of Mrs. Weldon. $28.00 in currency was taken from a wallet which was found on top of a chest of drawers in the bedroom, and 51c in small change from the top of the chest of drawers; and at the same time an index card was taken from the inside of a sewing machine on the service porch.

Previous to the time of the search a complaint had

been filed against said Seth J. A. Weldon before the United States Commissioner at San Diego charging him with a violation of U. S. C. A. Title 18, Section 152, in that he knowingly and fraudulently concealed assets from the creditors of his bankrupt estate. The officers were armed with a warrant of arrest issued on said complaint at the time of the arrest and search; but they had no search warrant.

Claiming that the search was unlawful and in violation of the Fourth Amendment in that it was an unlimited exploratory search, made without a search warrant, and also that the arrest was illegal—

Said Seth J. A. Weldon moved that said sum of $900.00 in currency, cigarette case, and two bills of sale be returned to his wife, Dorothy Weldon, and that $28.51 and one index card be returned to him; and he also moved that all of said evidence be suppressed.

Dorothy Weldon, by separate petition, moved that said sum of $900.00 in currency, one cigarette case, and bill of sale for Crosley car be returned to her.

After one hearing on the whole matter, each petition was denied. This is an appeal from the order of the Court denying said petitions.

Specifications of Error

Appellants respectfully submit that the Honorable District Court erred:

1. In finding that the arrest of Seth J. A. Weldon was lawful;

2. In finding that the property in question was lawfully seized incidental to a lawful arrest of Seth J. A. Weldon;

3. In finding that Dorothy Weldon had not established that the property she sought to have returned to her was property solely owned by her and in which her husband had no interest, or that the property was in her possession, as distinguished from the possession of her husband;

4. In refusing to order the return of said property;

5. In refusing to order the suppression of said property as evidence.

Summary of Argument

Point 1:

The complaint does not state a public offense.

The warrant of arrest was illegal.

The arrest was as if without a warrant.

Point 2: Agents of the Federal Bureau of Investigation may not arrest without a warrant except where there is reasonable ground to believe that the person arrested is guilty of a felony and that there is likelihood of his escaping before a warrant can be obtained for his arrest; and there was no such evidence.

Point 3: The search was not lawfully incidental to an arrest. It was an unlimited exploratory search for evidence, in violation of the Fourth Amendment.

Point 4: Ownership of the property seized, as between petitioners, was a false quantity.

Point 5: The Fourth Amendment is to be liberally construed in favor of the petitioners.

Point 6: The property having been seized in violation of the Fourth Amendment, it should have been returned; and it should also have been suppressed as evidence.

Argument

Point 1

The complaint does not state a public offense.

The warrant of arrest was illegal.

The arrest was as if without a warrant.

The illegality of the warrant of arrest arises from the insufficiency of the complaint filed before the United States Commissioner. The charging part of that complaint reads as follows:

> "That on or about June 10, 1950, at San Diego in the Southern District of California, the above-named defendant did knowingly and fraudulently conceal from the creditors of the bankrupt estate of Seth J. A. Weldon, doing business as Weldon's Modern Home Stores, San Diego, California, property belonging to said bankrupt estate." (Tr. p. 37)

Rule 3 of the Rules of the District Court, applicable to such complaints, is:

> "The complaint is a written statement of the essential facts constituting the offense charged . . ."

Rule 4 of said Court provides:

> "If it appears from the complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue," etc.

The complaint in this case states nothing but legal conclusions and is insufficient. It does not identify any

property which the accused is charged with having concealed; and the accused was therefore not informed of one of the necessary elements of the offense charged against him. Direct authorities, so holding, are—

U. S. vs. *Fuselier*, 46 F. (2d) 568.

White vs. *U. S.* 67 F (2d) 71.

See also

U. S. vs. *Hess*, 124 U. S. 483, 8 S. Ct. 571.

Persuasive authority to the same effect is found in a case where the accused was charged with perjury for having falsely omitted from his schedule in bankruptcy certain of his property, and wherein it was held that the indictment must not only allege that his deposition was false but it must go further and allege that he had other property, and describe the property so omitted; otherwise it does not inform him of the offense with which he is charged, and does not contain proper averments to falsify the matter wherein the perjury is assigned.

Bartlett vs. *U. S.*, 106 F. 884 (9th Cir.)

The arrest of Seth J. A. Weldon on a warrant issued on said property can not be justified.

U. S. vs. *Haberkorn*, 149 F. (2d) 720.

Point 2

The Agents of the Federal Bureau of Investigation Were Not Authorized to Arrest Weldon Without a Valid Warrant of Arrest. The Warrant was invalid.

Officers of such Bureau may arrest without a warrant only when they have reasonable grounds to believe that the person arrested is guilty of a felony and there is a likelihood of his escaping before a warrant can be obtained for his arrest; and there is no such evidence in this case.

It was so held in—

U. S. vs. *Haberkorn,* 149 F. (2d) 720.

Said case turned on a statute which was in effect at that time,

U. S. C. A. Title 5, Sec. 300-a,

reading as follows:

> "The agents of the Federal Bureau of Investigation . . . are empowered . . . to make arrests without warrants for felonies which have been committed and which are cognizable under the laws of the United States in cases where the person making the arrest has reasonable grounds to believe . . . there is a likelihood of the person escaping before a warrant can be obtained for his arrest, but the person arrested shall be immediately taken before a committing magistrate."

In said case of—

U. S. vs. *Haberkorn,* 149 F. (2d) 720,

it was held that the warrant of arrest was invalid

because the complaint was insufficient; therefore, the arrest was as if made without a warrant; also that F. B. I. agents could arrest without a warrant only when the person arrested was likely to escape.

Said statute was repealed by

> 62 Statutes at Large 862 (866), Chapter 645, Sec. 21, effective September 1, 1949. 1948.

However, said case undoubtedly states the law as it existed at the time of the arrest in the instant case for the reason that another statute, in substantially the same form, was enacted June 25, 1948—

> 62 Statutes at Large 817, Chapter 645, Sec. 3052, reading as follows:
>
> "The director, assistant directors, inspectors, and agents of the Federal Bureau of Investigation of the Department of Justice may carry firearms, serve warrants and subpoenas issued under the authority of the United States and make arrests, without warrants, for felonies cognizable under the laws of the United States where the person making the arrest has reasonable grounds to believe that the person arrested is guilty of such felony and that there is likelihood of his escaping before a warrant can be obtained for his arrest."

The unlawful search in this case cannot, therefore, be justified on the theory that it was made incidental to a lawful arrest for the reasons aforesaid:

1. The arrest was as if no warrant had been issued.

2. Without a warrant the F. B. I. agents had no authority to make any arrest whatever.

Point 3

The Search Was Not Lawfully Incidental to an Arrest. It Was Unlimited and Exploratory, In Search of Evidence.

This point involves questions of fact principally.

DOROTHY WELDON averred:

"Later on, and within a few minutes of their arrival as aforesaid, two of said men, whose names are unknown to me, in the absence of my husband and the other two officers who were in the bedroom, came into my livingroom, and one taking one side of the room and the other the opposite, they went through every drawer, every box, opened every piece of linen, turned over chairs and tables, looked under the rugs, took the panels out of the piano and searched the piano, looked into the radio and phonograph, looked into my personal correspondence box, opened every envelope, personal letters, and otherwise, looked in vases, books and magazines, and then had me move off the couch to check the cushions and inner linings. While they were searching, one of the men left the room and went out into the back yard. At that time the sum of $900.00 in the form of three $100.00 bills and twelve $50.00 bills was in my cigarette case in my bureau drawer among my clothing in the bedroom." (R. p. 8) "At said time said officers also took from my dresser drawer and from my possession a bill of sale for a 1948 Crosley pickup automobile made out to Anita Prince and also a bill of sale for furnishings made out to Paul S. Prince.

Said documents were left in my possession by Mrs. Prince, when she and her husband moved, to be picked up later." (R. p. 10) "The panels of the piano were removed. Agent Haack asked how it was done and I personally got up and showed him. Not only did he take the panel off but he tried every key; one didn't work and I explained that my cat knocked over a vase and water must have damaged it." (R. pp. 41 and 42) . . . "They continued the search into the kitchen and service porch. On the service porch, in a sewing machine drawer, they found a 3 x 5 index card listing money orders sent to Seth's mother in payment of a debt." (R. p. 42)

These averments are nowhere denied except for the denial that the panels of the piano were removed. (R. pp. 21, 26)

SETH J. A. WELDON averred:

"I know of my own knowledge that one of said officers took from my wife's dresser drawer, among her clothing, a cigarette case containing three $100.00 bills and twelve $50.00 bills, a total of $900.00, the property of my wife, acquired, as I verily believe, under the circumstances set forth in her accompanying affidavit, which I have read and believe to be true." (R. p. 6)

"At that time two bills of sale, the property of Anita Prince and Paul S. Prince, were also taken from the possession of my wife. (R. p. 6) . . . On said occasion, while in the process of searching said premises, one of

said men took from my wallet which was on top of a chest of drawers in the bedroom, the sum of $28.00 in currency, and also took from the top of the chest of drawers 51c in small change, all of which was my property. At said time said officers also took from the service porch of said premises an index card, about 3 x 5 in. ruled on one side, in the handwriting of my wife, which was my property." (R. p. 7)

Said averments were not denied.

SETH J. A. WELDON also averred:

As soon as Mr. Martindale entered affiant's bedroom and affiant raised himself from his bed, affiant found the necessity of relieving himself and going to the toilet for the purpose of urinating. This he did, and agent Martindale stood beside affiant while he was in the process of urinating in the toilet bowl, and said Martindale kept close watch of all actions and movements of affiant during that act, and he even observed affiant's private parts.

In addition to the search made of the property, as detailed in the original affidavits on file, in support of the motion to suppress and return evidence, said officers made a thorough search of the bathroom of said parties, opening and inspecting every article that was therein, including a box of Kotex, the property of affiant's wife. This box was opened, the contents emptied out, and thoroughly searched for hidden articles therein. (R. p. 36)

Said averments were not denied.

Agent Martindale, who appeared to be in charge, averred (R. p. 15) that during the course of the search he spoke with Attorney Davis, representing Mr. Weldon, over the phone and stated that he (Martindale) believed money "was *concealed* in Weldon's home and that Weldon's home was to be searched incidental to the arrest." He stated further (R. p. 16), that he explained to Mr. and Mrs. Weldon that the search would be expedited if two agents searched the living room while the other two agents searched the bedroom. Also that he and Agent Flack found a cigarette case, containing $900.00 in currency, in a dresser drawer in the bedroom (R. p. 16). "The search of the bedroom conducted by affiant and Agent Flack also revealed a bill of sale" (for the Crosley car) (R. p. 17). "A 3x5 index card was *seized* by Agents Geiermann and Haack" (R. p. 17). Martindale stated to Weldon that "inasmuch as the search was legally conducted incidental to Weldon's arrest, such search would have been carried out despite any objections." (R. p. 18).

Agent Geiermann averred, among other things: That Martindale explained to Mr. and Mrs. Weldon that the search would be expedited if two agents searched the living room, while the other two agents searched the bedroom. (R. p. 20.) Agents Haack and Geiermann "carefully searched the living room, the kitchen and the service porch. The panels were not removed from the piano, although a thorough search was conducted."

(R. p. 21.) In a drawer in a sewing machine on the service porch Agent Haack found a 3x5 index card. (R. p. 21.)

Agent Haack averred: Agent Martindale then took the telephone and stated that he believed there was money *concealed* in Weldon's home, and that Weldon's home was to be searched incidental to the arrest. (R. p. 25.) Upon completion of the telephone conversation, Agent Martindale explained to Mr. and Mrs. Weldon that the search would be expedited if two agents searched the living room, while the other two searched the bedroom (R. p. 25). Agent Geiermann and affiant (Haack) carefully searched the living room, the kitchen and the service porch. The panels were not removed from the piano, although a thorough search was conducted. . . . (R. p. 26). In a drawer in a sewing machine on the service porch affiant found a 3x5 index card (R. p. 26).

Agent Flack averred: That the attorney was advised over the phone that the agents had stated "that they intended to search the house in connection with his arrest although they did not hold a search warrant." (R. p. 31). Agent Martindale explained to Mr. and Mrs. Weldon that the search would be expedited if two agents searched the living room while the other two searched the bedroom. (R. p. 31.) Affiant and Agent Martindale found a cigarette case in a dresser drawer in the bedroom. Inside of this case was the sum of $900.00 in currency (R. p. 32). The search of the bedroom,

conducted by affiant and Agent Martindale, also revealed a bill of sale on the printed form of Nash San Diego, Inc., reflecting the sale of a Crosley automobile. (R. p. 32).

The foregoing undisputed facts establish, the appellants respectfully contend, that the search was unlimited and exploratory, in search of evidence. In fact, the officers went to the premises for the purpose of conducting the search. All the circumstances indicate that to be a fact. There was no likelihood that Weldon would escape; nevertheless, the officers chose 6:00 A.M. as the time for their visit and search. The arrest of Mr. Weldon was in fact incidental to the search—not the search incidental to the arrest.

The law in such a situation is clear.

This is not the case where, at the time of a valid arrest the arresting officer looked around and seized "fruits of evidence" of crime or contraband articles which were in plain sight and in his immediate and discernible presence, as in

U. S. vs. *Lee,* 274 U.S. 559, 47 S.Ct. 746.

Marron vs. *U.S.,* 275 U.S. 192, 48 S.Ct. 74.

The search in this case was such as is denounced by

Go-Bart Importing Co. vs. *U.S.,* 282 U.S. 344; 51 S.Ct. 153.

U.S. vs. *Lefkowitz,* 285 U.S. 452, 52 S.Ct. 420.

The right to enter the precincts of a home must be incidental only to a lawful arrest, and not for the purpose of securing evidence upon which to justify the arrest.

U.S. vs. *Vleck*, 17 F.Sup. 110.

In said case of *U.S.* vs. *Lefkowitz*, 285 U.S. 452, 52 S.Ct. 420, it is stated at page 461 as follows:

> "The Circuit Court of Appeals reversed (52 F. (2d) 52). It found that the search of the person of Lefkowitz was lawful and that the things taken might be used as evidence against him; held that the things seized when the office and furniture were explored did not belong to the same class; referred to *'the firmly rooted proposition that what are called general exploratory searches throughout premises and personal property are forbidden,'* and said that it did not matter 'whether the articles or personal property opened and the contents examined are numerous or few, the right of personal security, liberty, and private property is violated if the search is general, for nothing specific, but for whatever the containers may hide from view, and is based only on the eagerness of officers to get hold of whatever evidence they may be able to bring to light. . . . Such a search and seizure as these officers indulged themselves in is not like that in *Marron* vs. *United States*, 275 U.S. 192, where things openly displayed to view were picked up by the officers and taken away at the time the arrest was made. The decision that does control is *Go-Bart Importing Co.* vs. *United States*, 282 U.S. 344. Indeed, this case differs in its essential facts from

> that one so slightly that what is said in that opinion in characterizing the search made will apply with equal force to this one, which must accordingly be held unreasonable."

On page 463 of the same decision we find the following:

> "Save as given by that warrant and as lawfully incident to its execution, the officers had no authority over respondents or anything in the room. The disclosed circumstances clearly show that the prohibition agents assumed the right, contemporaneously with the arrest, to search out and scrutinize everything in the room to ascertain whether the books, papers, or other things contained or constituted evidence of respondents' guilt of crime, whether that specified in the warrant or some other offense against the act. Their conduct was unrestrained. The lists printed in the margin show how numerous and varied were the things found and taken . ."

Even if the F. B. I. agents had held a search warrant, still the search conducted in this case would not have been justified.

In *Gouled* vs. *U.S.*, 255 U.S. 298, 41 S.Ct. 261, it is stated:

> "Although search warrants have thus been used in many cases ever since the adoption of the Constitution, and although their use has been extended from time to time to meet new cases within old rules, nevertheless it is clear, at common law and as the result of the *Boyd* and *Weeks* cases, supra, they may not be used as a means of gaining access

to a man's house or office and papers, *solely for the purpose of making search to secure* evidence to be used against him in a criminal or penal proceeding, but that they may be resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken . . ."

(P. 309)

"While the contents of this paper are not given, it is impossible to see how the Government could have such an interest in such a paper that, under principles of law stated, it would have the right to take it into its possession to prevent injury to the public from its use. *The Government could desire its possession only to use it as evidence against the defendant, and to search for and seize it for such purpose was unlawful.*"

(P. 310)

The leading cases of

Boyd vs. *U.S.*, 116 U.S. 616, 6 S.Ct. 524;

Weeks vs. *U.S.*, 232 U.S. 383, 34 S.Ct. 341,

also strongly support appellant's position.

Point 4

Ownership of the Property Seized, as Between Petioners, Was a False Quantity.

The Honorable District Court denied the petition of *Dorothy Weldon* for the return of the property which petitioners sought to have returned to her for the reason that the Court found she had not established, to the satisfaction of the Court, that said property was solely owned by her and in which her husband had no interest, or that said property was in her possession, as distinguished from the possession of her husband. (R. pp. 57 and 58.) It is respectfully submitted that said decision is based on a false issue.

There was no denial of any of the averments of petitioners as to the nature and the origin of the property.

The property might even have been property concealed from the bankrupt estate; and it would still have been unlawful to seize it under the circumstances.

It was in the possession of the petitioners; and the gravamen of their complaint was that it was unlawfully taken from them in violation of the Fourth Amendment.

That amendment protects offenders as well as law-abiding citizens. A search such as was conducted in this case cannot be justified by the result.

U.S. vs. *Lefkowitz,* 285 U.S. 542; 52 S.Ct. 420.

Weeks vs. *U.S.*, 232 U.S. 383, 34 S.Ct. 341.

As shown by the evidence, the petitioners owned all of the property in question with the exception of the two bills of sale;; and Mrs. Weldon had a possessory right to that property. (R. pp. 8, 10, 11, 12 and 13.)

Such possessory right was sufficient to justify the petition.

Connolly vs. *Medalie*, 58 F.(2d) 629.

Point 5

Liberal Construction of Fourth Amendment

Constitutional provisions for the security of persons and property are to be liberally construed and, it is the duty of courts to be watchful of the constitutional rights of the citizen, and against any stealthy encroachments thereon.

Boyd vs. *U.S.*, 116 U.S. 616, 635; 6 S.Ct. 524.

Gouled vs. *U.S.*, 255 U.S. 304; 41 S.Ct. 261.

Point 6

Property Should Have Been Returned and Evidence Thereof Suppressed.

Appellants respectfully contend, therefore, without further argument, that, the property having been seized in violation of the Fourth Amendment, it should have been returned; and it should also have been suppressed as evidence.

Respectfully submitted,

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